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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 83

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. THE CONSTRUCTION OF SECTION 241(a)(4)

From the very beginning of the proceedings against him, petitioner has argued that § 241(a)(4), authorizing deportation of an "alien . . . who . . . is convicted", makes him deportable only if he was an alien when he was convicted.

The Government has now, for the first time, apparently conceded that petitioner's interpretation is permitted by the language of the statute.[1] It contends, however, that the contrary interpretation is required by *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, construing what respondent calls "substantially identical language."[2] It also contends that the contrary interpretation, authorizing petitioner's deportation even though he was not an alien when he was convicted, is the more natural and logical of the two interpretations permitted by the statutory language.

We submit that respondent's first contention cannot be supported and that its second contention, even if true, is ineffective to sustain the deportation order.

A. Eichenlaub v. Shaughnessy Is Not Authority for Construing Section 241(a)(4) as Applying to Petitioner

The *Eichenlaub* statute applied to "aliens who since August 1, 1914, *have been or may hereafter be convicted* . . . ." The Court, emphasizing the very language here emphasized (338 U.S. at 530), concluded:

> ". . . Congress, in 1920, evidently wanted to provide a means by which to free the United States of residents who (1) had been or thereafter were convicted of certain offenses against the security of the United States, (2) had been or thereafter were found, after hearing, to be undesirable residents of the United States, and (3) being aliens were subject to deportation. Congress said just that." 338 U.S. at 532-33.

The inference is thus inescapable that the *Eichenlaub* holding was based on the statute's use of the dual tense

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[1] Respondent's Brief, pp. 9-10.

[2] *Id.*, p. 18.

verbs "have been or may hereafter be". Despite the various dicta in the opinion, it would be impossible to maintain, in the light of the holding, that the Court would have reached the same construction had the statute merely said "may hereafter be". *Eichenlaub* is, therefore, not controlling authority over the instant statute.

B. The Principle of Fong Haw Tan v. Phelan Dictates a Construction of Section 241(a)(4) as Not Applying to Petitioner

The majority in *Eichenlaub*, as shown by the above-quoted holding, found no ambiguity in the 1920 statute. It saw no occasion, therefore, to invoke the principle of *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10, relied on by the dissent. The dissent, finding the statute ambiguous despite the dual tense verbs, said:

> "... Where, as here, a statute permits either of two constructions without violence to language, the construction which leads to hardship should be rejected in favor of the permissible construction consonant with humane considerations." 338 U.S. at 534.

We think we have shown in our main brief that § 241(a)(4) is at least ambiguous, if indeed, it does not plainly omit petitioner from its coverage. In any event, respondent seems now to have conceded that the words of the statute are susceptible of the interpretation petitioner urges. This is a situation, therefore, calling for choice of petitioner's interpretation, since it is "consonant with humane considerations" and can be reached "without violence to language."

Once finding that the words of the statute permit a construction which avoids deportation, the Court should be drawn, by its confirmed philosophy in de-

portation cases, to the conclusion that the favorable construction must apply. See cases cited in the *Eichenlaub* dissent, 338 U.S. at 533.[3] Respondent's argument that the construction less favorable to the alien is more logical is unavailing, whether or not it be true, for, as the unanimous Court said in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10:

> "... To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

II. THE RELATION-BACK PROVISION OF SECTION 340(a)

Respondent devotes over half of its argument to an attempted demonstration that the relation-back provision of the denaturalization statute was intended by Congress to make deportable under § 241(a)(4) an individual who was convicted of crimes between naturalization and denaturalization. The burden of respondent's argument is as follows: (1) that case law had established that denaturalization for fraud relates back for deportation purposes; (2) that this Court's *Eichenlaub* opinion unsettled that established proposition and invited Congress to settle it dispositively by legislation; and (3) that in the "dialogue between Court and Congress," which "was direct and sharply defined,"[4] the response of Congress was the insertion of the relation-back language in § 340(a) of the 1952 Act.

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[3] See also cases cited in Petitioner's Brief, p. 17, n. 17.

[4] Respondent's Brief, p. 36.

A. There Was No Pre-Existing Judicial Doctrine—for This Court to Have Unsettled in Eichenlaub v. Shaughnessy—That Denaturalization Relates Back for the Purpose of Deportation

Notwithstanding its most strenuous efforts, respondent has pointed to no decision of any court extending the relation-back doctrine to deportation, with the single exception of the Second Circuit opinions in the *Eichenlaub-Willumeit* cases. And when those cases reached this Court, approval of that extension was withheld. Thus the Sixth Circuit Court of Appeals was able to say in 1956 in *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663, 666:

> ". . . We have no difficulty in giving a retroactive effect to the denaturalization order in view of the authorities supporting such a ruling. But the Government has cited us no case from the Supreme Court or the U. S. Courts of Appeals which has gone the additional step and given such relation-back construction to the deportation statute. It was urged upon the Supreme Court in United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521, 529, 70 S. Ct. 329, 94 L. Ed. 307, where the Court found that a ruling on the question was unnecessary for a disposition of the case. We think that the Court's later ruling in Barber v. Gonzales, supra, 347 U.S. 637, 642, 74 S. Ct. 822, 98 L. Ed. 1009, indicates disapproval of a relation-back construction."

Apart from the Second Circuit's abortive extension of relation-back to deportation cases (which the Government failed even to cite to the *Brancato* court), there is no great mystery about the pre-1952 state of the case law on the relation-back theory. As respondent points out, revocation of naturalization was first

authorized in the Naturalization Act of June 29, 1906, § 15, 34 Stat. 601. That authorization was retained in the Nationality Act of 1940, § 338(a), 54 Stat. 1158. There was no question that the 1906 Act made a nullity of citizenship cancelled for fraud. *Johannessen* v. *United States*, 225 U.S. 227, 240-41. It was equally clear that revocation for fraud related back to vitiate derivative citizenship. *Rosenberg* v. *United States*, 60 F. 2d 475 (3rd Cir. 1932), *cert. denied*, 287 U.S. 645. What respondent fails to note, however, is that *Rosenberg* limited the relation-back concept to derivative citizenship, saying, "The question of the right of the Government to deport is not here involved." 60 F. 2d at 476. See also the language quoted from *Brancato*, *supra*.

Although there was no doubt of the relation back of a denaturalization grounded on actual fraud, there were conflicting decisions on the relation back of denaturalizations under the 1906 Act based on grounds other than actual fraud.[5] It was held in *Battaglino* v. *Marshall*, 172 F. 2d 979 (2d Cir. 1949), *cert. denied*, 338 U.S. 829, that a denaturalization for "presumptive fraud" based on an individual's return to his native land for permanent residence related back to vitiate derivative citizenship. Other courts, however, held, in similar circumstances, that the denaturalization did not relate back to affect derivative citizenship unless there was "actual fraud." *In re Bolter*, 66 F. Supp. 566 (S.D. Cal. 1946); *In re Findan*, 4 F. Supp. 189 (D.R.I. 1933). It was against this background of case

[5] Under the 1940 Act, derivative citizenship was affected only if the denaturalization was for "actual fraud." Sec. 338(d), 54 Stat. 1159.

law that the 1952 statute was adopted,[6] not against a background of an allegedly "settled" principle of relation back of denaturalization for the purpose of deportation, allegedly unsettled by this Court's *Eichenlaub* opinion.

B. The Legislative History of Section 340(a) Discloses No Intent That the Relation-Back Language Should Apply for the Purpose of Deportation

In § 340(e) of the new statute, 8 U.S.C. § 1451(e), Congress preserved the provision of the 1940 Act saving derivative citizenship in denaturalizations under that act upon grounds other than actual fraud. In § 340 (f) it set forth the circumstances under which derivative citizenship could be affected by denaturalizations under the new act. And, in § 340(a), it changed the grounds of denaturalization from fraud and illegal procurement to procurement "by concealment of a material fact or by willful misrepresentation". This last change was considered by Congress of major importance and, indeed, is the only provision of § 340 which is referred to in the legislative history. See H. Rep. No. 1365, 82d Cong., 2d Sess. (1952), U.S. Code Cong. and Adm. News 1653, at 1741 (1952).[7]

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[6] Although this conflict in the decisions related only to denaturalizations under the 1906 Act, cases under that act continued to arise long after the 1940 statute was adopted (see *Battaglino* v. *Marshall* and *In re Bolter*, *supra*) and, indeed, even after the 1952 Act was passed. The conflict is dramatically illustrated by two virtually simultaneous decisions by separate judges of the same court in 1956. Compare *Cepo* v. *Brownell*, 147 F. Supp. 517 (N.D. Cal.), with *Manha* v. *Brownell*, 146 F. Supp. 411 (N.D. Cal.).

[7] The House Report's reference to § 340, quoted in full, states:

"4. *Judicial Revocation of Nationality*

One of the major changes in existing nationality law provided by the bill is contained in section 340 which authorizes

Since the legislative history is completely silent as to the purpose of including the relation-back provision in § 340(a), we cannot, as seemingly the Government would have us do, dispositively prove that Congress intended only to affect derivative citizenship. We submit, however, that, in the light of (1) the conflicting decisions on whether it takes "actual fraud" to affect derivative citizenship by relation back of denaturalization, and (2) the substitution of new grounds of denaturalization for the fraud and illegal procurement grounds of the pre-existing statutes, the most likely reason for the insertion in § 340(a) of the relation-back language was to make certain that no court would interfere with the legislative intent that derivative citizenship be affected as provided in § 340(f). We submit that this reason for insertion of the language is certainly more likely than that suggested by respondent.

Respondent contends that the intent of Congress in inserting the relation-back clause was to settle a theretofore accepted proposition, allegedly unsettled by this Court in *Eichenlaub*, that denaturalization relates back to make the individual deportable for acts occurring while he held citizenship. This contention, we submit, is grounded upon fallacies and non-sequiturs and has not a shred of support in the legislative history.

In the first place, as we have shown, respondent is wrong in assuming that, before this Court's *Eichen-*

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revocation of naturalization. Under the provisions of section 338 of the Nationality Act of 1940, revocation is possible where the naturalization was obtained by fraud or was procured illegally.

The bill changes the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact or by willful misrepresentation."

laub opinion, there was a settled application of the relation-back concept to deportation. In fact, the concept had *never* been so applied, except in the Second Circuit's *Eichenlaub-Willumeit* opinions, which, until now, the Government has treated as what they really were—an abortive attempt to extend the relation-back concept to deportation. When this Court chose not to adopt the lower court's theory, therefore, it did not unsettle an accepted principle; it simply aborted an attempted venture into new ground.

From the false premise that this Court had raised a dramatic challenge in its *Eichenlaub* opinion, respondent takes off on a bold flight of fancy. It declares:

> "The dialogue between Court and Congress was direct and sharply defined, and, if by the enactment of the relation-back provision of § 340(a) Congress did not succeed in preventing the use petitioner seeks to make of his cancelled naturalization, it cannot be on the ground that that was not the Congressional will."[8]

This "direct and sharply defined" dialogue consisted, on the part of the Court, of the opinion handed down on January 16, 1950, and, on the part of Congress, of the introduction on August 27, 1951, more than nineteen months later, of a bill containing the relation-back language. Respondent can point to no language in any committee report or hearing or debate giving the slightest inkling that the relation-back language was occasioned in any way by this Court's *Eichenlaub* opinion. Moreover, the fact that a compendious report and an omnibus bill on immigration and naturalization were filed on April 20, 1950, without

[8] Respondent's Brief, p. 36.

any mention of that opinion or any relation-back provision, is ignored by respondent on an assumption that the legislative report process is too cumbersome to register events only ninety-four days old.[9] We suggest the possibility that, for so dramatic an event as a challenge which opens a "dialogue . . . direct and sharply defined", some staff member would have found a way to revise a page-proof.

Even if one indulges in respondent's assumption, there is still a long road to travel before one can accept respondent's "dialogue" theory. The bill introduced on April 20, 1950, was thereafter submitted to further study by a group of experts from the Department of State, the Immigration and Naturalization Service and the professional staffs of the Judiciary Committees of the House and Senate. "The bill was revised in detail and redrafted in a series of meetings during which suggestions of governmental and non-governmental agencies and institutions were received, analyzed and discussed." Besterman, *Commentary on the Immigration and Nationality Act*, 8 U.S.C.A., Part 1, p. 1, 3. The revised version, S. 716, 82d Cong., 1st Sess., was introduced on January 29, 1951, more than a year after the *Eichenlaub* opinion. Surely, even respondent would agree that there was time enough for some reaction to *Eichenlaub* to have manifested itself if there were any such reaction. But the new bill, like the old one, said nothing about relation back. Nor did the Department of Justice's section-by-section analysis of S. 716 give any indication of any purpose to have denaturalization relate back for the purpose of deportation.[10] In March and April of 1951, joint hear-

[9] Respondent's Brief, p. 31.

[10] See Petitioner's Brief, pp. 29-30, n. 20.

ings were held by subcommittees of both Judiciary Committees at which over sixty witnesses testified and numerous statements were submitted.[11] Respondent can point to nothing in the transcript of those hearings to suggest that anyone was reacting to *Eichenlaub*.[12] Not until a new "omnibus bill", S. 2055, 82d Cong., 1st Sess., was introduced on August 27, 1951, over nineteen months after *Eichenlaub*, did the relation-back language make its appearance. To respondent, this "belated addition . . . suggests irresistibly" that Congress was reacting to this Court's unsettling of the allegedly settled application of the relation-back doctrine for the purpose of deportation.[13]

We submit that respondent's contention is far from irresistible. We think the Court should reject it for the following reasons:

(1) As we have shown, there was no settled application for this Court to have unsettled in *Eichenlaub*.

(2) In the nineteen months after *Eichenlaub*, not only Congress, but also the immigration experts of the Department of Justice, had neglected repeated opportunities to react to this Court's allegedly unsettling opinion.

(3) Respondent cites nothing but its own conjectures to support its contention that the 1952 enactment of § 340(a) was Congress' response to *Eichenlaub*. Presumably, so important a purpose would have found some expression at some point

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[11] Besterman, *op. cit. supra*, p. 3.

[12] See Respondent's Brief, p. 34, n. 18.

[13] *Id.*, p. 35.

in the voluminous legislative history. All that the history shows, however, is that Congress' concern was the substitution of new denaturalization grounds for the fraud and illegal procurement grounds of the earlier statutes.[14]

(4) At least as probable as respondent's contention is petitioner's suggestion that the relation-back language was inserted in § 340(a) simply to put an end to the conflict of decisions as to the effect of denaturalization on derivative citizenship. The Court should, therefore, resolve any ambiguity in petitioner's favor. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10.

CONCLUSION

For the reasons stated herein and in petitioner's main brief it is respectfully submitted that the judgment of the court below should be reversed.

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[14] *Supra* note 7.